Chooi Chee Sum v Salehsan-Teck Thye Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D4-22-589-914
ABU SAMAH JC
12 AUGUST 1995

Civil Procedure *— Action — Striking out — Whether no reasonable cause of action or frivolous and vexatious or an abuse of the process of the court*

Companies and Corporations *— Derivative action — Striking out plaintiff's action — Whether exception to rule in* Foss v Harbottle *applicable — Rules of the High Court 1980 O 6 r 3(1)(a) & O 18 r 19*

The plaintiff and J (the second defendant) were both shareholders and directors of a company S (the first defendant). S entered into a contract with H (the third defendant) by which H agreed to pay to S a sum of money for work to be performed by S. S performed the work and H paid the money to J by way of payment to S. Allegedly J misappropriated the money and never deposited it into the bank account of S. The plaintiff brought an action on behalf of S purportedly as a derivative action for the benefits of S and all the shareholders of S other than J. There were four shareholders in company S, and their respective shareholdings (shown in brackets) were: the plaintiff (99,999), J (99,999), I(1) and Y(1). The third defendant applied to the court to strike out the plaintiff's action, one of the grounds being that the plaintiff's derivative action was defective for want of a statement of the capacity in which the plaintiff sued as required by O 6 r 3(1)(a) of the Rules of the High Court 1980 (RHC) and for failure to establish that the action was brought by the minority shareholders.

Held, allowing the third defendant's application:

(1) Order 6 r 3(1)(a) of Rules of the High Court 1980 applied to a derivative action.

(2) On the given facts, it was clear that the plaintiff together with I and Y constituted the majority shareholders and therefore could not bring the derivative action on behalf of S and the other shareholders. The plaintiff did not come within any of the exceptions to the rule in *Foss* v *Harbottle.*

[Bahasa Malaysia summary

Plaintif dan J (defendan kedua) merupakan kedua-dua pemegang saham dan pengarah sebuah syarikat S (defendan pertama). S mengikat satu kontrak dengan H (defendan ketiga) yang melaluinya H bersetuju membayar S sejumlah wang untuk kerja yang bakal dijalankan oleh S. S telah menjalankan kerja itu dan H membayar

wang itu kepada J sebayai bayaran kepada S. Dikatakan bahawa J telah melesapkan wang itu dan tidak pernah memasukkannya ke dalam akaun bank S. Plaintif membawa tindakan ini bagi pihak S kononnya sebagai satu tindakan derivatif bagi faedah S dan kesemua pemegang saham S selain daripada J. Terdapat empat pemegang saham di dalam S, dan pegangan mereka masing-masing (ditunjukkan di dalam kurungan) adalah: plaintif (99,999), J (99,999), I (1) dan Y (1). Defendan ketiga memohon kepada mahkamah untuk membatalkan tindakan plaintif, salah satu alasannya adalah bahawa tindakan derivatif plaintif adalah cacat kerana ketiadaan satu pernyataan tentang kedudukan dalam mana plaintif membawa tindakan seperti yang dikehendaki oleh A 6 k 3(1)(a) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan kerana kegagalan menunjukkan bahawa tindakan itu dibawa oleh pemegang saham minoriti.

Diputuskan, membenarkan permohonan defendan ketiga:

(1) Aturan 6 k 3(1)(a) KMT terpakai kepada satu tindakan derivatif.

(2) Mengikut fakta kes, adalah jelas bahawa plaintif bersama dengan I dan Y merupakan pemegang saham majoriti dan oleh itu tidak boleh membawa tindakan derivatif bagi pihak S dan pemegang-pemegang saham lain. Plaintif tidak jatuh di dalam linkungan mana-mana kecualian kepada peraturan di dalam *Foss v Harbottle*.]

Notes

For cases on action, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 29–113; [1989] *Mallal's Digest* paras 251–252; [1991] *Mallal's Digest* paras 173–180; [1992] *Mallal's Digest* paras 147–150; [1993] *Mallal's Digest* para 112; [1994] *Mallal's Digest* paras 176–180.

For cases on derivative action, see 2 *Mallal's Digest* paras 29–33; [1989] *Mallal's Digest* para 110; [1991] *Mallal's Digest* para 530; [1992] *Mallal's Digest* para 421; [1994] *Mallal's Digest* para 556.

Cases referred to

Bandar Builder Sdn Bhd v UMBC [1993] 3 MLJ 36 (folld)
Burland v Earle [1902] AC 83 (refd)
Daniels v Daniels [1978] 2 WLR 73 (folld)
Estmanco (Kilner House) v Greater London Council [1982] 1 WLR 2 (folld)
Foss v Harbottle (1843) 2 Hare 461 (folld)
Gold Ores Reduction Co v Parr [1892] 2 QB 45 (folld)
Huang Ee Hoe v Tiong Thai King [1991] 2 MLJ 51 (folld)
Hurley v BGH Nominees [1982] 1 ACLC 387 (refd)

Prudential Assurance Co Ltd v Newman Industries (No 2) [1982] 1 All ER 354 (folld)
Raja Abdullah Wahman v Nikseng Plantation Sdn Bhd (CS No D4-22-248-88)(unreported) (refd)
Smith v Croft (No 2) [1987] 3 All ER 909 (folld)
Watts v Midland Bank Plc [1986] BCLC 15 (folld)

Legislation referred to

Rules of the High Court 1980 O 6 r 3(1)(a), O 15 r 12, O 18 r 19
Rules of the Supreme Court 1965 [UK] O 15 r 12

T Thomas and *CC Chiew* (*Skrine & Co*) for the plaintiff.
Rosli Dahlan (*Allen & Gledhill*) for the third defendant.

Abu Samah JC: This is an application by the third defendant to strike out the plaintiff's action under O 18 r 19 Rules of the High Court 1980 (RHC) on the grounds that: it discloses no reasonable cause of action; it is scandalous, frivolous and vexatious; it may prejudice, embarrass or delay the fair trial of the action and that is an abuse of the process of the court.

Briefly the plaintiff's statement of claim is as follows.

The plaintiff, Chooi Chee Sum (Chooi) is and was at all material times a director and a shareholder of the first defendant (Salehsan). Chooi brings this action on behalf of Salehsan as a derivative action for the benefits of Salehsan, and for the benefit of all the shareholders of Salehsan other than the second defendant (Johnson).

Salehsan is and was at all material times the subcontractor for the third defendant (Humboldt), under an agreement in writing dated 16 July 1992 (principal agreement). Under this agreement Salehsan agreed to carry out civil works for Humboldt in relation to the modernization and expansion of the CIMA Cement plant in Perlis. By a second agreement in writing entered into between Salehsan and Humboldt, the former agreed to carry out additional variation works for the latter.

Johnson is and was at all material times a shareholder and the managing director of Salehsan and has control of the day to day running and management of Salehsan.

Salehsan carried out the civil works pursuant to the principal agreement and the second agreement and payments were due and payable thereunder from Humboldt to Salehsan. At various dates between 6 April 1993 and 24 March 1994, Humboldt made various payments by way of cash totalling RM1,960,506.30 to Johnson purportedly by way of payment to Salehsan and purportedly under the principal and second agreements.

Chooi alleged that Salehsan never received the cash payments because they were never deposited into the banking accounts of Salehsan.

Instead Johnson wrongfully and in breach of his duties to Salehsan misappropriated the said sum of RM1,960,506.30. Clauses 10.4 and 10.9 of the principal agreement require, among others, that all payments for the subcontract works shall be deposited into Salehsan's banking account by bank transfer (30) days from receipt of the invoices.

Chooi further stated in his statement of claim that he was compelled to present this action on behalf of Salehsan because the proper plaintiff, which ought to be Salehsan, could not institute this action due to a deadlock on the Board of Directors between Chooi and Johnson, with the other two directors remaining neutral.

Humboldt, in its defence inter alia stated that: the payment by way of cash cheques had been mutually agreed between Salehsan and Humboldt; the said sum of RM1,960,506.30 had been paid to Salehsan and duly acknowledged by Salehsan; the plaintiff has no locus standi to bring this action against Humboldt and that the plaintiff's action against Humboldt was frivolous, vexatious and an abuse of the process of court.

Humboldt's grounds to strike out the plaintiff's action

They are twofold. Firstly, the plaintiff's derivative action against Humboldt is defective, both in form and in substance. In form, it is defective because the writ is not indorsed with a statement of the capacity in which the plaintiff sues, as is required by O 6 r 3(1)(a) of the RHC. Learned counsel for Humboldt cited *The Supreme Court Practice* (1993) Vol 1 Pt 1 (*The White Book*) p 230 where it said:

> Under O 6 r 3, the representative capacity of the plaintiffs or defendants must be indorsed on the writ of summons (see *Re Royle* [1877] 5 Ch D 540). The representative capacity of the plaintiffs or defendants ought also to be stated in the title of the writ and the statements of claim (*Re Tottenham* (1986) 1 Ch 628) and it is desirable that it should also be stated in the body of the statements of claim and in the prayer.

He also referred to another passage at the same page where it stated that:

> the group or class of persons sought to be represented must be defined in the writ with sufficient clearness and precision. A claim to represent merely 'some of' the members of a class without defining which members would not be maintainable (*Mark & Co Ltd v Knight Steamship Co Ltd* [1910] 2 KB 1021).
>
> Where plaintiffs act as representative plaintiffs in a minority shareholders or derivative action, the court ought to determine, as a preliminary issue, whether they are entitled so to sue and whether the company was in fact under the control of those alleged to have practised a fraud on it before the court proceeded to hear the main derivative action (*The White Book*, p 229).

As for the substance, the learned counsel referred to para 3(c) of the plaintiff's statement of claim which states that the shareholders and their respective shareholdings in Salehsan (shown in brackets) are:

Hassan bin Hj Mohd Yunos(1), Hj Muhammad bin Ibrahim (1), Chooi (99,999) and Johnson (99,999). In para 3 of his affidavit (enc 6) Chooi claimed that 'I am one of the directors as well as a majority shareholder of the first defendant.' On the basis of his own pleading and affidavit, it is clear that Chooi, together with the other two shareholders, Hassan bin Hj Mohd Yunos and Hj Muhammad bin Ibrahim, who own (1) share each in Salehsan, constitute the majority shareholders and cannot bring this derivative action against the defendants. It was submitted that there were two preconditions to be satisfied before Chooi could bring a derivative action against the defendants. Firstly, such an action could only be brought by the minority shareholders. Secondly, there must be an allegation of fraud committed by the majority who were in control of the company against the minority. He cited *Palmer's Company Law* (21st Ed) p 509 which explained the procedure in a representative action under RSC O 15 r 12 as follows:

> The minority shareholders sue as plaintiffs on behalf of themselves and the other shareholders (except those consisting the majority), the company will normally be a defendant, and the directors or majority shareholders are likewise made defendants. The statement of claim in the minority shareholders' action founded on fraud on the minority is defective unless it contains an allegation that, owing to the wrongdoers being in control of the company, they cannot sue in the name of the company.

In *Huang Ee Hoe & Ors v Tiong Thai King & Ors* [1991] 2 MLJ 51 at p 52 Chong Siew Fai J, as he then was, stated the rule as follows:

> The basic rule of the law is that the only proper plaintiff in proceedings to redress a wrong against a company or to enforce a right of a company is the company itself. (*Foss v Harbottle*, *Burland v Earle* at p 93; *Paidiah Genganaidu v The Lower Perak Syndicate Sdn Bhd & Ors*). This rule has come to be known as the rule in *Foss v Harbottle*. However, difficulties and injustice arose where the majority of the directors or shareholders were the wrongdoers or benefited by the wrong because they would not sanction the bringing of actions by the company. To overcome the problem, exceptions to the rule have developed where minorities can bring a 'derivative action' (a term originated in the United States) on behalf of themselves and all the other shareholders (except the wrongdoer) against the wrongdoers, joining also the company as a defendant. One of such exceptions is where there is allegedly fraud on the minority and the wrongdoers are in control of the company (*Burland v Earle* at p 93).

In *Watts v Midland Bank Plc & Ors* [1986] BCLC 15, the plaintiffs, who were majority shareholders and directors of Ebrite Estates Ltd brought a derivative action against the receivers on behalf of Ebrite Estates Ltd for a declaration that an agreement for the sale of its leasehold interest was not binding. The court in dismissing the action held that there was no justification for allowing the derivative action as the plaintiffs, as directors and majority shareholders of Ebrite, could have procured the company to bring the action on its own behalf.

The principles governing derivative action are well illustrated in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] 1 All ER 354:

A derivative action is an exception to the elementary principle that A cannot, as a general rule, bring an action against B to recover damages or secure other relief on behalf of C for an injury done by B to C. C is the proper plaintiff because C is the party injured, and therefore the person in whom the cause of action is vested. This is sometimes referred to as the rule in *Foss v Harbottle* [1843] 2 Hare 461, 67 ER 189 when applied to corporations, but it has a wider scope and is fundamental to any rational system of jurisprudence. The rule in *Foss v Harbottle* also embraces a related principle, that an individual shareholder cannot bring an action in the courts to complain of an irregularity (as distinct from an illegality) in the conduct of the company's internal affairs provided that the irregularity is one which can be cured by a vote of the company in general meeting. We are not concerned with this aspect of the rule. The classic definition of the rule in *Foss v Harbottle* is stated in the judgment of Jenkins LJ in *Edwards v Halliwell* [1950] 2 All ER 1064 at pp 1066–1067 as follows. (1) The proper plaintiff in an action in respect of a wrong alleged to be done to a corporation is, prima facie, the corporation. (2) Where the alleged wrong is a transaction which might be made binding on the corporation and on all its members by a simple majority of the members, no individual member of the corporation is allowed to maintain an action in respect of that matter because, if the majority confirms the transaction, cadit quaestio; or, if the majority challenges the transaction, there is no valid reason why the company should not sue. (3) There is no room for the operation of the rule if the alleged wrong is ultra vires the corporation, because the majority of members cannot confirm the transaction. (4) There is also no room for the operation of the rule if the transaction complained of could be validly done or sanctioned only by a special resolution or the like, because a simple majority cannot confirm a transaction which requires the concurrence of a greater majority. (5) There is an exception to the rule where what has been done amounts to fraud and the wrongdoers are themselves in control of the company. In this case the rule is relaxed in favour of the aggrieved minority, who are allowed to bring a minority shareholders' action on behalf of themselves and all others. The reasons for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue.

Another case relied on by the learned counsel for the third defendant is *Burland v Earle* [1902] AC 83 where the House of Lords stated:

It is an elementary principle of the law relating to joint stock companies that the court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so. Again, it is clear law that in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company, the action should prima facie be brought by the company itself. These cardinal principles are laid down in the well-known cases of *Foss v Harbottle* (1843) 2 Hare 461 and *Mozley v Alston* (1847) 1 Ph 790, and in numerous later cases which it is unnecessary to cite. But an exception is made to the second rule, where the persons against whom the relief is sought themselves hold and control the majority of the shares in the company, and will not permit an action to be brought in the name of the company. In that case the courts allow the shareholders complaining to bring an action in their

> own names. This, however, is mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress, and it is obvious that in such an action the plaintiffs cannot have a larger right to relief than the company itself would have if it were plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the shareholders, or are capable of being confirmed by the majority. The cases in which the minority can maintain such an action are, therefore, confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company.

The second ground relied upon by Humboldt to strike out the plaintiff's action was that, on merits, the plaintiff had no right to commence this action. Paragraph 4 of the affidavit of Paul G Kuhr, (encl 5) filed on behalf of Humboldt stated that it had actually paid the full sum as claimed in Chooi's statement of claim, to Salehsan. The payments were duly acknowledged and receipts, exhibited as PGK 1–14 to the said affidavit, were issued by Salehsan. It was not Humboldt's business to interfere with the internal management affairs of Salehsan as to what happened to payments made to Salehsan for there were matters purely between Chooi, Salehsan and Johnson.

Based on the above grounds, Chooi's action against Humboldt was without any reasonable cause, frivolous and vexatious and an abuse of the process of the court.

Chooi's reply

The learned counsel for Chooi submitted that O 6 r 3 RHC was in respect of a representative, and not a derivative, action. He relied on the case of *Raja Abdullah Wahman & Ors v Nikseng Plantations Sdn Bhd & Ors* (CS No D4-22-248-88) (unreported) where the court held that there was a distinction between a representative action and a derivative action and that O 6 r 3 RHC did not apply to a derivative action. Although the decision was under appeal, it was submitted that it was correctly decided.

In reply to the submission of the learned counsel for Humboldt that there must be an allegation of fraud committed on the minority by the majority who were in control of the company before the plaintiff could bring a derivative action against the defendants, the learned counsel for the plaintiff cited *Daniels & Ors v Daniels & Ors* [1978] 2 WLR 73, *Estmanco (Kilner House) Ltd v Greater London Council* [1982] 1 WLR 2 and *Hurley & Anor v BGH Nominees Pty Ltd & Ors* [1982] 1 ACLC 387.

The court in *Daniels v Daniels* held that the exception to the rule in *Foss v Harbottle* enabling a minority shareholder to bring an action against a company for fraud where no other remedy was available, should include cases where, although there was no fraud alleged, there was a breach of duty by directors and majority shareholders to the detriment of the company and the benefit of the directors; accordingly, on the facts alleged, the minority shareholders had a cause of action. This is what Templeman J in that case said:

> The authorities which deal with simple fraud on the one hand and gross negligence on the other do not cover the situation which arises where, without fraud, the directors and majority shareholders are guilty of a breach of duty which they owe to the company, and that breach of duty not only harms the company but benefits the directors. In that case it seems to me that different considerations apply. If minority shareholders can sue if there is fraud, I see no reason why they cannot sue where the action of the majority and the directors, though without fraud, confers some benefit on those directors and majority shareholders themselves. It would seem to me quite monstrous — particularly as fraud is so hard to plead and difficult to prove — if the confines of the exception to *Foss v Harbottle* [1843] 2 Hare 461, were drawn so narrowly that directors could make a profit out of their negligence.

In *Estmanco (Kilner House) Ltd* the court allowed the applicant, the purchaser of one of the flats sold by the Greater London Council (the defendant) to be substituted as plaintiff, the company (original plaintiff) to be added as an additional defendant and to continue the action originated by the company, in her name as a derivative action. The applicant had to do this after the Greater London Council (defendant) which controlled the voting rights in the company voted at the company's EGM to discontinue the action. Sir Robert Megarry VC, expressed the view that the exception usually known as 'fraud on minority' to the rule in *Foss v Harbottle* was wide enough to cover the present case and that if not, it should now be made wide enough. When Sir James Wigram VC decided in *Foss v Harbottle* it may be doubted whether he foresaw the vigorous and active life which his decision would lead, or the many controversial obscurities that would arise about actual or possible exceptions from the rule that he was laying down. At p 15, Sir Robert Megerry VC said:

> ... there can be no doubt about the injury to the applicant and the rest of the minority, both as shareholders and as purchasers, of that discontinuance; and I feel little doubt that the council had used its voting power not in order to promote the best interests of the company but in order to bring advantage to itself and disadvantage to the minority. Furthermore, that disadvantage is no trivial matter, but represents a radical alteration in the basis on which the council sold the flats to the minority. It seems to me that the sum total represents a fraud on the minority in the sense in which 'fraud' is used in that phrase, or alternatively represents such an abuse of power as to have the same effect.

The plaintiff's counsel also cited *Hurley & Anor v BGH Nominees Pty Ltd & Ors* [1982] 1 ACLC 387 where White J said at p 392:

> The exception in favour of minority (or deadlocked) shareholders to bring action on behalf of a company is based upon the proposition that a fraudulent irregularity or illegality is incapable of cure by the passing of an ordinary resolution in general meeting and that there would be a failure of justice if the company remained powerless to remedy it. Normally the company would itself sue as plaintiff, but since this is impossible, the minority (or deadlocked) shareholders sue on its behalf, naming the company as defendant.

The issues

The issues for my decisions are whether:

(i) Order 6 r 3(1)(a) of the RHC applies to a derivative action; and,

(ii) the plaintiff comes within the exceptions to the rule in *Foss v Harbottle*.

Order 6 r 3(1)(a) RHC

O 6 r 3(1): Before a writ is issued it must be indorsed —

> (a) Where the plaintiff sues in a representative capacity, with a statement of the capacity in which he sues;

No direct authority on O 6 r 3(1)(a) RHC was cited to me by the learned counsel for the third defendant apart from the rule itself. The learned counsel for the plaintiff cited to me the case of *Raja Abdullah Wahman & Ors v Nikseng Plantation Sdn Bhd* where the High Court held that there was a distinction between a representative action and a derivative action and that O 6 r 3 (1)(a) RHC did not apply to derivative action.

I have no reason to disagree with the learned judge in *Raja Abdullah Wahman*'s case. A derivative action is based on O 15 r 12 RHC. *Palmer's Company Law* Vol 2 para 8.804 at p 8177 says:

> This procedure is founded in RSC 1965 O 15 r 12, but it is not a true representative action, but a right of action vested in or derived from a company. Hence in modern discussions the action is referred to as a derivative action.

Whether the plaintiff comes within the exceptions to the rule in Foss v Harbottle

Foss v Harbottle established the rule that the proper plaintiff in a action in respect of a wrong alleged to be done to a corporation is, prima facie, the corporation itself. Jenkins LJ in *Edwards v Halliwell* stated that:

> there is, an exception to the rule where what has been done amounts to fraud and the wrongdoers are themselves in control of the company. In this case the rule is relaxed in favour of the aggrieved minority, who are allowed to bring a minority shareholders' action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue.

Palmer's Company Law Vol 2 para 8.815 at p 8188 states:

> In order for the plaintiff to have locus standi to bring a derivative action in a case of fraud, he must also be able to show that the alleged wrongdoers control the company. Otherwise, in the absence of such control, the general meeting of shareholders may safely be left to decide whether it is in the company's interests to embark upon litigation ... . It has always been held that showing that the alleged wrongdoers own majority of the

A shares conferring voting rights amount to proof of control for these purposes, and that it is not necessary to go further and show that a demand was made of the wrongdoers to institute proceedings and that they refused it.

In *Prudential Assurance Co Ltd v Newman Industries (No 2)*, it was held B that in an action, 'brought by a minority shareholder, the question whether in fact the company was controlled by the alleged wrongdoer should first be determined before the derivative action itself was allowed to proceed'.

As far as the other cases to which I have referred to earlier are C concerned, they clearly show that a derivative action can only be brought by the minority shareholders on behalf of themselves and the other shareholders against the wrongdoers who are in control of the company, the company being added as a nominal defendant.

On the facts before me, it is clear that Chooi together with Hassan bin Hj Mohd Yunos and Hj Muhammad bin Ibrahim, who own (1) D share each in Salehsan, constitute the majority shareholders and therefore cannot bring this derivative action on behalf of Salehsan and the other shareholders (except Johnson) against the third defendant. Chooi does not come within any of the exceptions to the rule in *Foss v Harbottle*. There is no allegation that Johnson controls the voting power of the E company. There is also no allegation that the other two directors, who elected to remain neutral, own any share in the company. On the contrary, Chooi himself claims, in para (3) of his affidavit (Enc 6) that 'I am one of the directors as well as a majority shareholder of the first defendant.' The learned counsel for Chooi did, on 3 January 1995 file a corrective affidavit, affirmed by Chooi to show that he was not the F majority shareholder of Salehsan. I have not taken this affidavit into consideration as it was filed after I have heard the submissions of both counsels on 14 December 1994 and adjourned the case for my decision to 13 February 1995. In any event, any defect or omission in the statement of claim cannot be made good by affidavit evidence: *Gold Ores Reduction Co v Parr* [1892] 2 QB 45. G

That being the case it is not necessary for me to decide whether Chooi is competent, in the light of the decisions in *Daniels & Ors v Daniels & Ors* and *Estmanco (Kilner House) Ltd v Greater London Council*, to bring a derivative action on the basis of alleged breach of duties by Johnson where no fraud is alleged. H

Merits

In my view it is equally unnecessary to go into the merits of the case. The question whether the plaintiff is entitled to bring a derivative action against the third defendant should be decided as a preliminary I issue.

In *Prudential Assurance Co Ltd*, the second and third defendants applied by summons issued on 10 May 1979, to dismiss the plaintiff's action by invoking the rule in *Foss v Harbottle*. Vinelott J dismissed the

summons, not on the ground that the plaintiffs were entitled to bring a derivative action but on the ground that it was more convenient to decide that issue after the action had been tried. The Court of Appeal made this pertinent observations:

> ... we have no doubt whatever that the judge erred in dismissing the summons of 10 May 1979. He ought to have determined as a preliminary issue whether the plaintiffs were entitled to sue on behalf of Newman by bringing a derivative action. It cannot be right to have subjected the company to a 30 day action (as it was then estimated) in order to enable him to decide whether the plaintiffs were entitled in law to subject the company to a 30 day action. Such an approach defeats the whole purpose of the rule in *Foss v Harbottle* and sanctions the very mischief that the rule is designed to prevent. By the time a derivative action is concluded, the rule in *Foss v Harbottle* can have little, if any, role to play. Either the wrong is proved, thereby establishing conclusively the rights of the company, or the wrong is not proved, so cadit quaestio.

Although obiter and not the ratio decidendi in that case the above approach had been adopted in *Smith v Croft (No 2)* [1987] 3 All ER 909 and in *Huang Ee Heo & Ors v Tiong Thai King & Ors*. Knox J in *Smith v Croft* viewed the above observations 'as a guide to be followed as faithfully as possible.'

For the above reasons, I allowed the third defendant's application to strike out the plaintiff's action under O 18 r 19 RHC as being frivolous, vexatious and an abuse of the process of the court. It is plain and obvious that Chooi cannot bring this derivative action for the benefits of Salehsan and for the benefits of all the shareholders of Salehsan other than Johnson, as Chooi together with the other two shareholders belong to the majority and not minority shareholders of Salehsan. The Supreme Court in *Bandar Builder Sdn Bhd & Ors v UMBC* [1993] 3 MLJ 36 held that:

> It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd*), and this summary procedure can only be adopted when it can be clearly seen that a claim is on the face of it 'obviously unsustainable' (see *AG of Duchy of Lancaster v L & NW Rly Co*).

Chooi's derivative action is, in my view, obviously unsustainable.

Taxed costs to the third defendant.

Application allowed.

Reported by Edmund Cham